United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-4151

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4151

REYES FRIAS DELEON,

Petitioner,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW FROM

THE BOARD OF IMMIGRATION APPEALS

PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING EN BANC

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Reyes Frias Deleon petitions this Court for a rehearing of his petition for review of the decision of the Board of Immigration Appeals denying him relief from an order of deportation, and he suggests rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

Petitioner contends that there are a number of material misapprehensions of fact in the Court's opinion which, taken together, may have affected the decision of the panel majority, and which create the appearance of a different standard of legal analysis applicable to aliens without character references

or influence. In addition, the panel opinion depends on an inaccurate statement of legislative history and policy, and construes an immigration statute in a manner contrary to well-settled principles which have been consistently applied by other panels of this Circuit.

1. Errors of Fact

The Immigration and Naturalization Services has attempted in this case to insinuate, without proof on the record, that Petitioner is a "criminal type," implying to the Court that because he is not John Lennon, former Beatle, or Shaheen Rehman, graduate student with good character references, the law can more easily be construed against him. See Lennon v. I.N.S., 527 F.2d 187 (2d Cir. 1975); Rehman v. I.N.S., No. 76-4022 (2d Cir., October 14, 1976), slip op. 99. Compare DiPasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947)(L. Hand, J.).

The Court's statement of facts accepts the Service's groundless allegations arising dehors the record more than once, despite denials by Petitioner under oath, objections by counsel, and a motion to exclude the government's appendix, which is the source of some of them.

Petitioner testified that the charge that he had killed his first wife was judicially dismissed on grounds of self-defense. The contrary "finding" of the Immigration Judge that Frias was not tried on this charge because he left the country during the revolution, which the majority reports at 5860, is based only on the question of the immigration trial

attorney "And isn't it a fact that the case was suspended because of the revolution?" Petitioner replied to the contrary. Id. at C-12. Surely a baseless question is not "reasonable, substantial and probative evidence" admissible to support a deportation order. 8 U.S.C. §1252(b)(4).

The opinion of the majority reports that Frias jumped bail and went to Canada. The only basis for the first of these "facts" is the government's Appendix A to its brief on appeal, a criminal docket sheet which had never been before the administrative agency and which Petitioner moved to strike as improper and irrelevant. The only possible source for the notion that he went to Canada would be the superseded Order to Show Cause of July 17, 1973, Exhibit 1A at the Hearing, but this is no more than a charge which the Service never even sought to prove.

The majority comments that if Mr. Frias thought the Board had overlooked his persecution claim, his remedy was a motion to reconsider. Op. at 5872. However, 8 C.F.R. §3.8 explicitly provides:

> The filing of a motion to reopen or reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

Counsel for Petitioner specifically moved the Board, both orally and in writing, for a stay of an adverse decision, due to an unfortunate earlier experience with the Service's precipitous deportation of another client, but the Board granted no stay. Admin. Rec. #5 at 11, #4 at 12,

#3 at 2. Only filing an immediate petition for review in this Court under 8 U.S.C. §1105a(a) could permit Frias to remain with his family while his legal defenses to deportation were litigated. He should not be penalized for statutory and regulatory procedural anomolies over which he has no control.

2. Errors in the Analysis of §241(f)

a. Legislative History

The parties did not brief the legislative history of §241(f). Not having the benefit of adversarial analysis, the Court incompletely recounts the legislative history, and therefore draws incorrect conclusions about the policies underlying the statute.

As the Court states, §241(f) is basically a reenactment of §7 of the 1957 amendments to the Immigration and Nationality Act. Section 7 contained two waiver provisions: the first was a mandatory waiver which was codified as §241(f) in 1961 (Public Law 87-301, §16), and the second was a waiver subject to the discretion of the Attorney General for those who entered by fraud on visas obtained between 1948 and 1954 and who could establish that their fraud was motivated by fear of persecution and not by the desire to evade quotas. Persons in the second category were not required to have permanent residents or American citizens as close relatives in order to qualify. This second section, never codified, was not reenacted in 1961,

because the post-war period had passed and the section's humanitarian function had been served. The legislative history of the first section covering close relatives of American citizens or permanent residents, should be the focus of the Court's attention in this case. The legislative history cited by the majority, however, relates to the second obsolete provision. The next page of the House Report after that cited in the majority opinion indicates the primary concern of Congress was not the type or degree of fraud, as it was for the other provision, but rather the "family situation". Previously individuals who had entered the United States by fraud but who had citizen or permanent resident spouses or children could turn only to private Congressional bills in order to keep their families intact. The committee wrote in support of the new provision:

> ... it is unfair and improper to extend the benefit of legislative relief solely to a few selected individuals who are in a position to reach the Congress for redress of their grievances. It is felt that that humanitarian approach should be extended to an entire defined class of aliens rather than to selected individuals.

H.R. No. 1199, 85th Cong., 1st Session 10-11 (1957), reprinted in 2 U.S.C. Cong. & Adm. News 2022-24 (1957). Those who misrepresented their homelands to avoid persecution were the beneficiaries of the other discretionary clause of §7. It was the desire to unite families that moved Congress to enact the mandatory provision which is now §241(f). That purpose is ill-served by the majority's erroneous construction, resting as it does on the legislative history of a different provision which was repealed in 1961.

b. The Relationship Between §241(f) and §241(a)(5).

Contrary to the majority's reading, op. at 5867, Petitioner does not contend that all convictions under 18 U.S.C. §1546, nor all grounds of deportability under §241(a)(5), would come within the language of 241(f). To the contrary, most criminal violations under both sections do not relate to fraud at entry. Moreover, there is no basis for saying that criminal impersonation has been singled out as more serious than other kinds of fraud still held waivable in Reid v. I.N.S., 420 U.S. 630 (1975). The aliens Errico and Scott in I.N.S. v. Errico, 385 U.S. 214 (1966), (explicitly upheld on its facts by the Reid court) both conceded that they had knowingly made false statements with respect to material facts, namely that Errico was a skilled auto mechanic and Scott was married to a citizen. Those statements on immigration applications were punishable under 18 U.S.C. §1546 paragraph (4), punishable by the same prison term of up to 5 years and fine of up to $2,000. The legislative policy of §241(f) to keep families together is distorted by an attempt to make paragraph 3 of 18 U.S.C. §1546 appear more serious than paragraph 4, though both are punishable by the same penalty. 1/

1/ The Court's reference to possible evasion of inspection is simply unsupported by the record in this case. Slip op. at 5870. Neither the Service nor the Court has any reason to believe that Mr. Frias evaded inspection, and it would be a violation of the due process ensured by 8 U.S.C. §1252(b)(4) to deport him on such a general allegation.

c. Statutory Construction

The majority's narrow reading of §241(f) is contrary to long held principles of construction of immigration statutes, and in conflict with the holdings of other panels of this and other courts. As Judge Oakes wrote in dissent, it is settled doctrine in the Supreme Court as well as in this Court, that deportation statutes, because of their Draconian consequences, are to be construed in favor of the alien and against the I.N.S. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388 (1947); Barker v. Gonzales, 347 U.S. 637 (1954); I.N.S. v. Errico, 385 U.S. 214 (1966); Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975)(Kaufman, C.J.); Rehman v. I.N.S., No. 76-4022 (2d Cir., October 14, 1976), slip op. 99, at 104 n. 6 (Lumbard, J.) and 107 (Mansfield, J., concurring); Barrese v. Ryan, 203 F. Supp. 880, 887 (D. Conn. 1962) (Timbers, D.J.).

The net effect of the Court's opinion is to turn a carefully drafted extremely narrow mandatory exemption from deportation into a discretionary waiver. This very result was condemned by the Third Circuit in Persaud v. I.N.S., 537 F.2d 776 (1976), on closely related facts. It was disavowed by this Court in Pereira-Barreira v. I.N.S., 523 F.2d 503, 508 n. 5 (2d Cir. 1975). The majority seems disturbed by the fact that most other provisions for relief from deportation are not mandatory. The court points to three kinds of discretionary waivers provided by Congress: 8 U.S.C. §1254, relating to persons who have remained in this country for 10 years after a deportable offense and can establish their good character; id. §1182(e) applying to

foreign students and id. (h) applying to exchange visitors convicted of crimes of moral turpitude, two crimes, or engaging in prostitution; and 8 U.S.C. §1259 granting a clean record of admission to certain aliens who entered the United States before 1958. The existence of these discretionary waivers demonstrates that when Congress intends to enact a discretionary waiver it does so. They do not provide authority for distorting the mandatory exemption provided by §241(f) into a discretionary waiver dependent on the government's choice of a formal ground for deportation or its decision to prosecute criminally one alien but not another who entered fraudulently.

CONCLUSION

The opinion of the panel majority contains misapprehensions of fact and law which merit a reassessment of the opinion by the Court. The numerous factual distortions create the impression that the Service's groundless insinuations succeeded in establishing a different standard of statutory analysis for a person alleged to have a criminal record, then for those thought to have more illustrious backgrounds.

The Court's holding respecting §241(f) transforms a narrow but significant source of mandatory protection for the families of American citizens or permanent residents, one of whose alien members entered this country by fraud, into a discretionary tool in the hands of the Attorney General. The Court should reconsider this holding, for it is grounded on an incomplete analysis of the legislative history, and an incorrect reading of a criminal statute, and it conflicts with the well-settled principle of statutory construction that deportation provisions will be construed against the I.N.S. and for the alien-petitioner.

WHEREFORE, Petitioner respectfully requests that the Petition for Rehearing be granted and suggests that the Court reconsider such a significant interpretation of immigration law en banc.

Respectfully submitted,

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CERTIFICATION

This is to certify that two copies of the foregoing have been given to Taggart Addams, Assistant United States Attorney, United States Courthouse Annex, 1 St. Andrews Plaza, New York, New York 10007.

Jorge Hyatt